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LAW OFFICES  
**HALEY, BADER & POTTS**

4350 NORTH FAIRFAX DR., SUITE 900  
ARLINGTON, VIRGINIA 22203-1633  
TELEPHONE (703) 841-0606  
FAX (703) 841-2345

POST OFFICE BOX 19006  
WASHINGTON, D.C. 20036-9006  
TELEPHONE  
(202) 331-0606

SUSAN H. ROSENAU

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**SEP 8 1993**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

September 7, 1993

***By Hand Delivery***

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

OUR FILE NO.  
0992-102-60

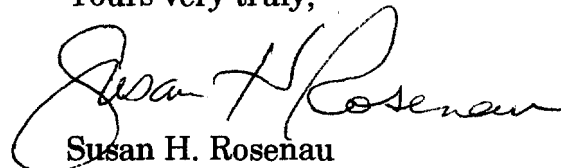
RE: MM Docket No. 93-42, Calistoga, California

Dear Mr. Caton:

On behalf of Moonbeam, Inc., an applicant (File No. BPH-911115MG) for a New FM Station on Channel 265A in Calistoga, California, please find the original and six copies of the Reply of Moonbeam, Inc. in Support of Second Motion to Enlarge in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,

  
Susan H. Rosenau

Enclosures (6)

cc: Moonbeam, Inc.  
Robert Zauner, Esquire  
A. Wray Fitch, Esquire  
Administrative Law Judge Edward Luton

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**Federal Communications Commission** **RECEIVED**

Washington, D.C. 20554

**SEP 8 1993**

In re Applications Of	)	<b>Docket No. MM 93-43</b>	FEDERAL COMMUNICATIONS COMMISSION
MOONBEAM, INC.	)	File No. BPH-911115MG	OFFICE OF THE SECRETARY
GARY E. WILLSON	)	File No. BPH-911115MO	
For a Construction Permit for a	)		
New FM Station on Channel	)		
265A in Calistoga, California	)		

To: The Honorable Edward Luton  
Administrative Law Judge

## Reply of Moonbeam, Inc. in Support of Second Motion to Enlarge

Pursuant to Section 1.229 of the Commission's Rules, Moonbeam, Inc. ("Moonbeam"), by its attorneys, respectfully submits this Reply to the Opposition of Gary Willson ("Willson") to Moonbeam's August 5, 1993 Second Motion to Enlarge Issues Against Gary E. Willson ("Motion"), stating in support thereof as follows:

1. In its Motion, Moonbeam requested the addition of issues against Willson regarding false financial certification, financial qualifications, and misrepresentation.
  
2. The basis of Moonbeam's Motion was Willson's sworn testimony that he had relied on a financial statement dated November **15**, 1991 to certify his application for construction permit (FCC Form 301), which he signed on November **12**, 1991, **three days prior to the date of the financial statement.**

3. In opposition to Moonbeam's motion, Gary Willson argues:

(a) that Willson was not required to have a financial statement at the time of certification;

(b) that Willson is financially qualified because he has many valuable assets at his disposal, and because he is financially qualified, he has no motive to misrepresent; and

(c) that Willson did not, as testified, rely on the November 15, 1991 financial statement in certifying his financial qualification, but relied on his personal knowledge of his assets and his computer records, which were legally sufficient bases for his certification.

As shown below, Willson's arguments leave unresolved the substantial and material questions of fact raised by Willson's testimony.

Accordingly, the requested issues must be added.

#### **I. THE NEED FOR A FINANCIAL STATEMENT**

4. At the time of Willson's application and currently, FCC Form 301 instructed *all applicants* that:

(3) The applicant must also have on hand at the time it files its application, BUT NEED NOT SUBMIT WITH THE APPLICATION, the following documentation:

(a) For the applicant:

A detailed balance sheet at the close of a month within 90 days of the date of the application showing the applicant's financial position.

5. Willson is indisputably an applicant. Although the plain language of FCC Form 301's instructions state that all applicants *must* have a detailed balance sheet on hand at the time of financial certification, Willson argues that no such requirement exists. In support of his argument, Willson cites *HS Communications, Inc.*, 4 FCC Rcd. 6448 (Rev. Bd. 1992) and *Grady Lynn*, 7 FCC Rcd. 8535 (Rev. Bd. 1992).

6. *Grady Lynn* has no relationship whatsoever to the facts herein, and is cited only for language taken out of context regarding technical requirements. *HS Communications*, although closer to the facts herein, is also inapposite. In *HS Communications*, the petition requesting financial issues was untimely. In consequence, the Review Board applied a stricter standard to the petition, requiring a demonstration of "decisional significance" and "a substantial likelihood that potentially disqualifying allegations will be proven." *Id.* at 6454, citing *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd. 4331, at 4332 (1991). In contrast, Moonbeam's motion was timely filed within 15 days of Willson's testimony and within three days of receiving the hearing transcript. Accordingly, the foregoing heightened standard does not apply. Moonbeam need only establish the existence of a substantial and material question of fact. See *Astroline Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C.Cir. 1988).

7. Second, Willson should not be permitted to argue that Willson's lack of a financial statement lacks legal significance. In his Second Petition to Enlarge Issues, Willson argued the exact opposite, *i.e.*, that financial issues *must* be added against Moonbeam because there existed a question whether Mary Constant had a financial statement at the time of certification. Now, Willson asks the Presiding Officer apply a different

rule to him under like circumstances.<sup>1</sup> It is the law of the case herein that, financial issues having been designated against Moonbeam based on lack of a financial statement, the same issues must also be designated against Willson upon showing that when he certified, he had no financial statement satisfying the FCC Form 301 instructions. In short, having sought and obtained financial issues against Moonbeam *on precisely these grounds*, justice requires that Willson be estopped from a 180° reversal of his prior position.<sup>2</sup>

## **II. WILLSON HAS MADE MISREPRESENTATIONS AND HAS MANUFACTURED EVIDENCE**

8. Third, and most significantly, *HS Communications* concerns only issues of financial qualifications, and has no bearing on the allegations of false certification and misrepresentation raised herein. Willson produced the November 15, 1991 financial statement in response to the Presiding Officer's Order, released June 1, 1993 (FCC 93M-316), which stated:

What Willson apparently does have is a personal financial statement showing available net liquid assets in excess of liabilities sufficient to meet projected costs. In the interest of assuring the full and equal disclosure contemplated by Section 1.355(c)(1)(v), Willson will be directed to produce this information (i.e. "financing documents"), precisely because he proposes to utilize his own resources to meet projected costs.

*Id.* at 1.

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<sup>1</sup>Moonbeam still maintains that Ms. Constant had a financial statement at the time of certification. However, Willson's petition -- and the Presiding Officer's Memorandum Opinion and Order -- were predicated on a contrary assumption.

<sup>2</sup>Further, on its face, Willson's reversal demonstrates that one of the two pleadings -- the second enlargement petition or the opposition herein -- must have been made in bad faith and in violation of Section 1.52 of the Commission's Rules.

9. The text of the order makes clear that the Presiding Officer expected Willson to produce the financial statement he relied upon when certifying his financial qualifications on November 12, 1991. At that point, if Willson did not have such a statement, he should have so advised the Presiding Officer and Moonbeam. He did not. Neither did Willson reveal the existence of the computer records on which he now claims he relied (and which he could also have produced were no financial statement available). Instead, Willson produced the November 15, 1991 financial statement, presumably intended to mislead the Presiding Officer and Moonbeam that the statement produced was the basis of Willson's financial certification.

10. When questioned regarding the issue, Willson unequivocally stated *under oath* that he relied on the November 15, 1991 financial statement when certifying his financial qualifications.<sup>3</sup> Simply stated, *Willson could not have based his November 12, 1991 financial certification on a financial statement that did not yet exist.* Even assuming, *arguendo*, that Willson's lack of a financial statement at certification does not cast doubt on his financial qualifications, the fact remains that Willson blatantly perjured himself before the Presiding Officer. For this, Willson offers no explanation.

11. Willson now argues that, because he is wealthy,<sup>4</sup> he had no reason to misrepresent the circumstances of his financial certification. Opposition at 8. To the contrary, Willson had a very substantial motive.

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<sup>3</sup>In his opposition, Willson argues that his answer was not complete. Opposition at 8. The record refutes that argument. At no time did Willson attempt on redirect to expand upon or modify his answer. Further, Willson was entirely free to answer Moonbeam's question in the negative.

<sup>4</sup>It has not escaped Moonbeam's notice, however, that Willson has been much more detailed and forthcoming regarding his assets than he has been regarding his liabilities, *see* Opposition, Exhibit 1, *passim*. Moonbeam further notes Willson's admission that he is relying on community property to finance his proposed station. Opposition, Exhibit 2.

In his second enlargement petition against Moonbeam, Willson argued that lack of a financial statement at the time of financial certification *per se* requires addition of financial qualification and false certification issues. If Willson admitted that he had no financial statement when he certified as to his own financial qualifications, he would also admit that financial issues and false certification issues must *per se* be added against him as well. In short, Willson did not want to be hoisted on his own petard. Unfortunately, Willson's inept attempt to avoid the trap by manufacturing evidence and giving false testimony has revealed his willingness to deceive the Commission, and requires the designation of the requested issues.<sup>5</sup>

### CONCLUSION

12. "The determination of which factual version is indeed accurate is precisely the function of an evidentiary hearing," *Shirley Marchant*, 4 FCC Rcd 5241, 5242 (Rev. Bd. 1989), *citing California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 680 (D.C. Cir. 1985). Where, as here, there are "diametrically opposed and otherwise conflicting statements presented," a hearing must be convened. 4 FCC Rcd at 5242. In the course of this proceeding, Willson has produced a financial statement which bore the same date as the filing of his application, but which post-dated his financial certification by three days. Willson then

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<sup>5</sup>Willson's timeliness arguments do not merit a response, but Moonbeam nonetheless will briefly address them here. As stated above, Moonbeam's motion was filed within fifteen days of Willson's testimony and within *three* days of receiving the hearing transcript, and as such is clearly timely. Further, Willson did not produce the November 15, 1991 financial statement until after Willson's deposition, and Moonbeam had no intervening opportunity to question Willson under oath. With the new evidence provided by Willson in his testimony, Moonbeam timely filed its petition pursuant to Section 1.229.

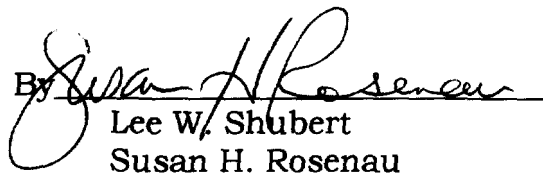
Finally, Willson has, in this proceeding, filed *three* untimely enlargement petitions, and excused his laxity each time with the argument that misrepresentation issues call for disregard of the timeliness provisions of Section 1.229. Given the patent perjury issues raised in this petition, leeway is even more warranted here.

offered sworn testimony that he relied on the financial statement in certifying his financial qualifications. Now, after Moonbeam's filing of an enlargement petition, Willson has repudiated his testimony and claims that the financial statement he produced had no relevance to this proceeding.

Clearly, substantial and material issues of fact exist which warrant the addition of the financial, false certification, and misrepresentation issues sought, and most especially the misrepresentation issues. Accordingly, Moonbeam respectfully requests that the Presiding Officer designate the issues set forth in its Second Motion to Enlarge Issues Against Gary E. Willson, and grant the discovery requested therein.

Respectfully submitted,

**MOONBEAM, INC.**

By   
Lee W. Shubert  
Susan H. Rosenau

Its Attorneys

**HALEY, BADER & POTTS**  
Suite 900  
4350 North Fairfax Drive  
Arlington, VA 22203-1633

703/841-0606

September 7, 1993



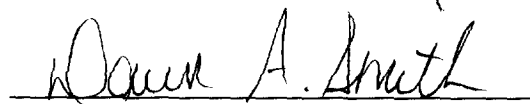
CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing Reply of Moonbeam, Inc. in Support of Second Motion to Enlarge was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered\*, to the following:

A. Wray Fitch, III, Esquire  
Gammon & Grange  
8280 Greensboro Drive  
McLean, VA 22102-3807

Administrative Law Judge Edward Luton  
2000 L Street N.W.  
Washington, D.C. 20036

Robert Zauner, Esquire\*  
Federal Communications Commission  
Mass Media Bureau, Hearing Branch  
Suite 7212  
2025 M Street N.W.  
Washington, D.C. 20554

A handwritten signature in cursive script, reading "Dawn A. Smith", is written over a horizontal line.

September 7, 1993